



INVOLUNTARY GUILTY PLEA – PRESERVATION

A valid waiver of the right to appeal does not forfeit a claim that the plea was not knowingly, voluntarily, and intelligently entered (*see People v Williams*, 27 NY3d 212, 221-222 [2016]). However, generally such a claim must be preserved for appellate review (*see id.*; *People v Conceicao*, 26 NY3d 375, 382-383 [2015]). To preserve the claim, the defendant must file a to CPL 220.60 (3) motion to withdraw the plea before sentencing (*see People v Williams*, 27 NY3d at 221-222; *People v Seaberg*, 74 NY2d 1, 10 [1989]).

Only the grounds alleged in the motion will be preserved for review (*see People v Lopez*, 71 NY2d 662, 665-666 [1988]). The defendant's failure to make the appropriate motion denies the trial court the opportunity to address the perceived error and take corrective measures (*see id.*). However, there are several situations in which a lack of preservation will not preclude appellate review.

Exceptions

No Practical Ability

When a sentence is imposed during the proceeding at which the defendant pleaded guilty, the defendant does not have the ability to file a motion to withdraw the plea before sentencing (*see People v Tyrell*, 22 NY3d 359, 364 [2013]; *People v Louree*, 8 NY3d 541, 545-547 [2007]; *People v Lopez*, 71 NY2d at 666). In this

instance, a claim that the plea was involuntary is reviewable on appeal, even though no motion was filed.

Additionally, where a deficiency in the plea allocution is so clear from the record that the court's attention should have been instantly drawn to the problem, the defendant does not have to preserve a claim that the plea was involuntary (*see People v Louree*, 8 NY3d at 545-547). For example, defendants need not preserve a claim that the plea court's failure to inform them of the postrelease supervision component of the sentence rendered the plea involuntary (*see id.*). After all, when defendants first learn of the error at sentencing, they have no practical ability to move to withdraw the plea and cannot be expected to do so (*see* CPL 220.60 [3]; *People v Louree*, 8 NY3d at 545-547; *People v Jones*, 200 AD3d 713, 714 [2d Dept 2021]; *cf. People v Murray*, 15 NY3d 725, 726-727 [2010] [preservation required where the court mentioned PRS at the outset of sentencing because the defendant could have sought relief before the sentence was imposed]).

Further, preservation may not be required where the defendant had no knowledge of the ground upon which vacatur is sought (*see People v Peque*, 22 NY3d 168, 182-183 [2013], *cert denied* 574 US 840 [2014]; *People v Louree*, 8 NY3d at 545-547). For example, in one of the companion cases resolved in *People v Peque*, the trial court never alerted the defendant that he could be deported as a result of his guilty plea. Since the defendant did not know about the possibility of

deportation during the plea and sentencing proceedings, he had no opportunity to withdraw his plea based on the court's failure to apprise him of the potential for deportation (*see People v Peque*, 22 NY3d at 183).

Thus, where a defendant has no practical ability to object to an error in a plea allocution which is clear from the face of the record, preservation may not be required (*see People v Peque*, 22 NY3d at 182-184; *People v Louree*, 8 NY3d at 545-547; *People v Hernandez*, 2023 NY Slip Op 01530 [2d Dept 2023]).

Statement Inconsistent with Guilt

Where the defendant's recitation of the facts underlying the crime pleaded to casts significant doubt on guilt or otherwise calls into question the voluntariness of the plea, the trial court must inquire further to ensure that the guilty plea is knowing and voluntary (*see People v Worden*, 22 NY3d 982, 984 [2013]; *People v Mox*, 20 NY3d 936, 938-939 [2012]; *People v Lopez*, 71 NY2d at 666-667). For example, if the factual recitation negates an essential element of the crime pleaded to, the court may not accept the plea without further discussion to ensure that the defendant understands the nature of the charge and that the plea is intelligently entered (*see People v Worden*, 22 NY3d at 985-986). Similarly, if the plea allocution raises the possibility of a viable defense, the trial court must inquire further and verify that the defendant has discussed the defense with counsel and chosen not to assert it (*see People v Mox*, 20 NY3d at 939).

Where the court fails in this duty, the defendant may challenge the sufficiency of the allocution on direct appeal, even though a formal post-allocution motion was not made (*see id.*) In such cases, the court’s attention should have been instantly drawn to the problem, ensuring that the salutary purpose of the preservation rule is not jeopardized (*see id.*; *People v Lopez*, 71 NY2d at 666).

Interest-of-Justice Jurisdiction

Where a defendant has failed to preserve his contention that a plea was not knowingly, voluntarily, and intelligently entered, the intermediate appellate court may still take corrective action and reverse the judgment by exercising its interest-of-justice jurisdiction (*see* CPL 470.15 [3] [c]; *People v Williams*, 145 AD3d 100, 104-109 [1st Dept 2016]).

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